

<b>TAMAIRA WRIGHT</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,044,688
<b>GOODYEAR TIRE &amp; RUBBER COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

Respondent and its insurance carrier appealed the July 13, 2010, Award entered by Administrative Law Judge Brad E. Avery (ALJ). The Workers Compensation Board (Board) heard oral argument on January 12, 2011. Tom Arnhold was appointed as Board Member Pro Tem for the purposes of this appeal.

This is a claim for a November 25, 2008, accident. In the July 13, 2010, Award, Judge Avery determined claimant sustained a 13.5 percent whole body functional impairment after giving equal weight to the rating opinions of Pedro A. Murati, M.D., and Peter V. Bieri, M.D. The ALJ determined claimant was entitled to receive permanent

partial disability benefits for an 84 percent work disability,<sup>1</sup> which was based upon a 68 percent task loss and a 100 percent wage loss. With regard to medical benefits, the Award provided that claimant was entitled to unauthorized medical care up to the statutory limit, future medical care upon application and review, and claimant's family physician, Dr. Morgan, was appointed to provide palliative care.

In its brief to the Board, respondent states:

Dr. Bieri, the court appointed physician; Dr. Lapse, the treating physician; and Dr. Gilbert, all released the claimant to regular work without restrictions (citation omitted). Judge Avery apparently disregarded this testimony, or at least failed to consider it impartially as required by statute. The claimant herself testified that she did not lose any time from her job, she returned to that regular job until the layoff. That she accepted a layoff so that others with seniority might remain on the job. Claimant further testified that if she had been called back to work at any time during the layoff, she would have returned to her job. Here again, it appears that Judge Avery did not apply the rule of evidence of impartiality and, it seems, he disregarded that testimony altogether.<sup>2</sup>

Respondent contends claimant sustained only a scheduled injury to the right upper extremity. Respondent maintains that the work disability award should be reversed and an award for an 8 percent functional impairment to the upper extremity should be entered.

On the other hand, claimant requests the Board affirm the Award. Claimant contends her testimony, the medical opinions of Dr. Murati, and the report of Dr. Bieri establish that claimant sustained permanent injuries to her right shoulder and neck as a result of the November 25, 2008, work-related accident. Claimant maintains her permanent injuries to her right shoulder and neck resulted in a 13.5 percent whole person functional impairment and an 84 percent work disability, which is based upon a 68 percent task loss and a 100 percent wage loss.

The first issue before the Board on this appeal is the nature and extent of claimant's injuries and disability. Respondent further disputes claimant's right to future medical treatment.

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<sup>1</sup> A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

<sup>2</sup> Respondent's Brief at 8 (filed Aug. 18, 2010).

**FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent on January 21, 2008, as a CFE booker. This job was very physical, requiring claimant to handle weights up to 80 pounds. On November 25, 2008, claimant and a co-worker were carrying a piece of material to be loaded into a trap which held rubber to be used in the manufacture of tires. When the co-worker dropped the opposite end of the material, it caused claimant's end to jerk, injuring claimant's right shoulder and neck. Claimant felt pain in her shoulder with radiating pain into her neck. Claimant later developed headaches from this injury. Claimant advised respondent of the accident, and the nurse in the dispensary was informed that claimant had a burning pain in her shoulder and neck. Respondent's dispensary records only noted right shoulder complaints. Additionally, the K-WC E-1, Application For Hearing, filed March 10, 2009, lists only right shoulder when specifying the extent of injuries claimed.

Claimant was referred for treatment and testified that she informed all doctors of her neck symptoms. However, for reasons unknown, she only received treatment for her shoulder. Claimant was initially unable to see the company doctor and went, instead, to the Holton Community Hospital emergency room on December 7, 2008. There, she was examined by Vance Lassey, M.D., who noted significant muscle spasm involving the neck, accompanied with complaints of pain in the right shoulder. Claimant was prescribed medication and physical therapy. Claimant saw Dr. Davies, the company doctor, the following day. Claimant reported intermittent numbness in the right 4<sup>th</sup> and 5<sup>th</sup> digits. On December 11, 2008, she was examined by Dr. Zidek, another personal physician. At that time, she reported severe neck and right shoulder pain and was taken off work. Plain x-rays taken of claimant's shoulders on December 30, 2008, were consistent with minimal degenerative changes. An MRI was recommended but not approved at that time.

Because of her consistent complaints, claimant was referred to board certified orthopedic surgeon Peter Lepse, M.D., on February 19, 2009. Dr. Lepse noted the complaints in claimant's neck but concentrated primarily on her shoulder. An MRI of the right shoulder was performed on March 2, 2009, and was consistent with impingement syndrome. Claimant's shoulder was injected on March 9, 2009, with reported improvement. However, claimant continued to experience pain radiating from the shoulder into the right side of her neck. Claimant was somewhat improved by April 6, 2009, but she still experienced pain from her right shoulder to her neck. Claimant underwent additional physical therapy and a home exercise regimen, and was released without restrictions by Dr. Lepse, effective July 15, 2009.

Claimant took a voluntary layoff from respondent on April 6, 2009. This allowed someone with less seniority to remain on the job. Up to this point, from November 2008 to April 2009, claimant had continued to work for respondent, although at a reduced pace. After leaving respondent, claimant applied for and collected unemployment benefits. At the time of the regular hearing on April 29, 2010, claimant remained on unemployment benefits, although the benefits were about to run out.

With her current condition, claimant does not feel she would be able to return to work for respondent as a booker. It would be too much for her to handle with her shoulder and neck problems. Currently, she stays home, painting ceramics. She fishes a couple of times a month and does housework. When asked about job searches, claimant agreed that unemployment requires for you to look for work. However, claimant testified that, as she was laid off from Goodyear, and as it was a temporary layoff, she was not required to look for work.

Claimant visited her family physician, David R. Allen, M.D., on October 6, 2009. Claimant reported persistent pain from her right shoulder into the right side of her neck. She also suffered headaches and was placed on Lortab as needed for pain relief. She continued with the earlier prescribed home exercise regimen.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an evaluation on September 8, 2009. Claimant complained of tightness in her neck and right shoulder, popping of the right shoulder and frequent headaches. X-rays of the right shoulder (taken December 30, 2008) displayed degenerative joint disease of the AC joint. The March 2, 2009, MRI of the right shoulder showed supraspinatus tendonosis of the shoulder and the possibility of a partial tear of the AC joint. During the examination, claimant acknowledged that she had injured her left shoulder. This occurred while claimant was working for Payless in 2000. However, she advised Dr. Murati that the shoulder problems from that injury had resolved. Dr. Murati diagnosed claimant with right carpal tunnel syndrome, right rotator cuff tear versus strain and myofascial pain syndrome of the right shoulder girdle extending into the cervical paraspinals.

Claimant was restricted in an 8-hour day to no ladder climbing, crawling, heavy grasp with the right upper extremity or above chest level with the right, no lift/carry/push/pull greater than 20 pounds and that only occasionally; occasional grasp and grab with the right; frequent repetitive hand controls on the right; frequent lift/carry/push/pull to 10 pounds and constant to 5 pounds. Claimant was restricted to working no more than 18 inches from her body on the right and should avoid awkward positions of the neck. Claimant should not use hooks or knives on the right side and

keyboarding was limited to 15 minutes on and 45 minutes off. Claimant was prohibited from using vibratory tools with her right upper extremity.

Claimant was rated by Dr. Murati at 10 percent impairment to the right upper extremity for carpal tunnel syndrome and 12 percent impairment to the right upper extremity for moderate crepitus of the right shoulder (both of which combine for a 21 percent upper extremity impairment and convert to a 13 percent whole person impairment); and a 5 percent whole person functional impairment for the neck sprain. All combined, claimant was rated at 17 percent impairment of the whole person.

After reviewing the task list of vocational specialist Robert W. Barnett, Ph.D., Dr. Murati determined that claimant had lost the ability to perform 19 of 28 tasks for a 68 percent task loss.

Claimant was referred by respondent to board certified orthopedic surgeon John H. Gilbert, M.D., who is in Dr. Lapse's office, on November 17, 2009. Claimant reported shoulder and neck pain as well as headaches. Dr. Gilbert examined claimant, recording normal findings with regard to the neck. Range of motion and foraminal closure tests of the neck were normal. Dr. Gilbert was unable to find any muscle spasm during the examination. However, he did not do any palpation during the examination and agreed that palpation was the classical means of detecting spasm. He did not use a goniometer or other type of device to test the range of motion. But, claimant could touch her chin to her shoulder and that, in Dr. Gilbert's opinion, indicated a full range of motion. Dr. Gilbert offered no treatment recommendations for the neck and released claimant without restrictions. He found no task loss associated with claimant's neck injuries.

With regard to the right shoulder, Dr. Gilbert reported the possibility of a SLAP lesion. Moderate arthrosis of the acromioclavicular joint with impingement and indentation of the supraspinatus tendon could be significant. Claimant also displayed a diminished grip on the right side. Both the SLAP lesion and moderate arthrosis could be surgically addressed. He opined that claimant may require further treatment to include arthroscopy with an eye toward decompression and/or repair as indicated. In his opinion, claimant could do the task of removing tires weighing up to 60 pounds. Dr. Lapse had earlier released claimant without restrictions, and Dr. Gilbert also elected to assign no restrictions. However, Dr. Gilbert was unwilling to testify that claimant could return to her former job without risk of further injury.

Claimant was referred by the ALJ for an independent medical examination (IME) to board certified disability evaluating physician Peter V. Bieri, M.D., on March 2, 2010. The injury history provided Dr. Bieri was consistent with claimant's prior testimony.

Dr. Bieri was provided medical records from a multitude of examining and treating physicians, including MRI reports and x-ray reports. Plain x-rays of the shoulders were consistent with minimal degenerative changes. A right shoulder MRI performed on March 2, 2009, was consistent with impingement syndrome. The right shoulder had been injected on March 9, 2009. Claimant was somewhat improved by April 6, 2009, but continued to have complaints of pain radiating from the right shoulder into the right neck.

During the examination, claimant described persistent pain in her right shoulder and neck with difficulty with shoulder level and overhead use of the right arm. Claimant had persistent pain in the right neck with intermittent numbness and tingling of the right 4<sup>th</sup> and 5<sup>th</sup> digits. Claimant complained of frequent right side headaches which she related to the right neck pain. Range of motion in the cervical spine was reduced as to flexion, extension and right lateral flexion, accompanied by subjective increases in complaints of pain and brief palpable muscle spasm and guarding. Her right shoulder was slightly tender to palpation at the AC joint, radiating into the right deltoid. Strength was slightly reduced to resisted flexion and abduction and self-limited due to pain. Claimant displayed negative Phalen's and Tinel's at the right wrist. But, her grip strength on the right was only 18.0 kilograms as compared to 24.0 kilograms on the left side. Dr. Bieri determined that claimant had suffered an injury to her right shoulder from her work injury, with subsequent complaints consistent with right cervical strain. He diagnosed impingement syndrome of the right shoulder from her work-related accident.

Claimant was rated by Dr. Bieri at 8 percent impairment to the right upper extremity for range of motion deficits of the right shoulder. However, Dr. Bieri determined that while claimant displayed subjective complaints of numbness, she failed to meet the criteria for a permanent impairment from the entrapment neuropathy of the right upper extremity. The 8 percent impairment to the upper extremity converts to a 5 percent whole person impairment. Claimant was also rated at 5 percent impairment to the whole person for the range of motion limitations of the cervical spine, pursuant to the fourth edition of the *AMA Guides*,<sup>3</sup> under the DRE Cervicothoracic II. All combined, claimant was assessed a 10 percent whole person impairment. Possible surgical intervention to the right shoulder was discussed. Claimant was released without formal restrictions.

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<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

Respondent argues that claimant's award should be limited to the right upper extremity, with no involvement of the neck or cervical spine. While it is true that claimant initially filed an accident report involving only the right shoulder, claimant's complaints almost immediately included the cervical spine. The ER records from December 7, 2008, indicate shoulder pain and muscle spasm in the neck. Claimant's complaints, from that point forward, consistently included the cervical spine. X-rays were consistent with degenerative changes, and muscle spasm and radiculopathy down the right upper extremity were noted by several of claimant's examining and treating physicians. While it is noted that the majority of claimant's complaints and most of the treatment centered on the right upper extremity at the level of the shoulder, the complaints regarding the neck and cervical spine remained consistent. The Board finds that the accident on November 25, 2008, injured both claimant's right upper extremity including the shoulder, the musculature of her neck and her cervical spine.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>7</sup>

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<sup>4</sup> K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>7</sup> K.S.A. 44-510e(a).

Both Dr. Murati and Dr. Bieri rated claimant's shoulder and neck. Dr. Gilbert elected to only rate the shoulder. As the Board has determined that claimant's injuries involved both, the omission by Dr. Gilbert of the cervical spine calls into question his opinion. The ALJ utilized the opinions of Dr. Bieri and Dr. Murati in concluding that claimant suffered a 13.5 percent permanent partial functional impairment to the whole person. The Board concurs with and adopts that finding.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.<sup>8</sup>

Claimant submitted to a voluntary layoff on April 6, 2009. Claimant's justification for the voluntary act was to allow someone with less seniority to remain on the job. Additionally, claimant testified that her job duties with respondent continued to cause her pain. She was having significant difficulties performing her job. While respondent argues that the voluntary departure by claimant justifies a denial of any work disability, the recent Supreme Court case of *Bergstrom*<sup>9</sup> defeats respondent's argument. There is no longer a requirement that a claimant put forth a good faith effort to maintain or seek employment. Claimant's departure here, at least in part, stemmed from the injuries suffered on November 25, 2008.

Here, claimant has looked for work after signing up for unemployment. However, claimant has been unable to find a job. Therefore, her wage loss under K.S.A. 44-510e is 100 percent.

Claimant's task loss was determined by Dr. Murati to be 68 percent. However, both Dr. Gilbert and Dr. Bieri determined that claimant should be released to return to work with no restrictions. Dr. Gilbert found claimant suffered no task loss from the accident on November 25, 2008. While Dr. Gilbert did not include the cervical spine in his assessment

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<sup>8</sup> K.S.A. 44-510e.

<sup>9</sup> *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).



of claimant, Dr. Bieri did. The Board finds that claimant's task loss is 34 percent. When combining and averaging the wage loss with the task loss, the Board finds claimant has suffered a permanent partial general (work) disability of 67 percent. The Award of the ALJ will be modified accordingly.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>10</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Tamaira Wright, and against the respondent, Goodyear Tire & Rubber Company, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred on November 25, 2008, and based upon an average weekly wage of \$548.80.

The Award of the Administrative Law Judge is modified as follows: Claimant is entitled to permanent partial disability compensation at the rate of \$365.88 per week not to exceed \$100,000.00 for a 67 percent permanent partial general disability. In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

As of February 21, 2011, there would be due and owing to claimant 116.86 weeks of permanent partial disability compensation at the rate of \$365.88 per week totaling \$42,756.74, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$57,243.26 shall be paid at the rate of \$365.88 per week until fully paid or until further order from the Director.

**IT IS SO ORDERED.**

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<sup>10</sup> K.S.A. 2008 Supp. 44-555c(k).

Dated this \_\_\_\_ day of February, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Jeff K. Cooper, Attorney for Claimant  
       John A. Bausch, Attorney for Respondent and its Insurance Carrier  
       Brad E. Avery, Administrative Law Judge